Tip of the Mitt Watershed Council

June 3, 2013

Michigan House of Representatives
Committee on Natural Resources, Chair Representative Andrea LaFontaine

RE: Testimony on Senate Bill 163 – Changes to Michigan's Wetland Protection Program

Dear Representatives:

Tip of the Mitt Watershed Council, on behalf of its 2,400 plus members, wishes to extend our concern with regards to Senate Bill 163. Tip of the Mitt Watershed Council opposes this bill, as currently written.

Michigan has a proud tradition of being one of only two states to administer Section 404 of the Clean Water Act (CWA). To keep the authority to administer Section 404, the state must maintain a program that is equivalent to the federal program administered by the Environmental Protection Agency.

The U.S. Environmental Protection Agency (EPA) conducted a comprehensive review of the state of Michigan's CWA section 404 permitting program, including the state's statutory and regulatory provisions governing the program as well as the State of Michigan's administration of the program, at the request of environmental and conservation organizations in the state.

Through the review, EPA found several deficiencies in the legal authorities establishing the approved CWA section 404 program and in the program's administration. These deficiencies are identified in the Final Report of the U.S. Environmental Protection Agency's (EPA) review of the State of Michigan's Clean Water Act (CWA) section 404 program. Included in the Final Report are also corrective actions needed to address the deficiencies. This bill fails to adequately correct all of the deficiencies as the state is required to do and makes additional changes that would put Michigan further out of compliance.

We would fully support making the necessary corrective actions that will ensure Michigan can maintain assumption of the 404 program. However, broadening state exemptions, altering our mitigation program, and changing what wetlands Michigan's regulates all go beyond the specifications of the federal program, making the state program weaker than the federal program. In addition, many of the changes unnecessarily increase program costs and reduce revenue being raised from those parties that utilize and benefit from the program. Therefore, we oppose Senate Bill 163 as currently written.

Specifically, we believe the following points need to be addressed:

Part 13

The proposed changes to Part 13 are much broader than the Wetland Protection Act. The impetus for these amendments is an EPA audit of Michigan's administration of the federal 404 program as well as recommendations from the Wetland Advisory Council. As such, the amendments should stick solely to those areas impacted by the EPA review and not interfere with the implementation of other programs. These proposed changes to Part 13 would affect at least 40 other unrelated programs, by our count. The burdensome and vague requirements under the proposed changes would impact all of the industries above. The language has extremely broad implications and altering the permitting system for all of these industries would only serve to hurt Michigan's business and our economy. It is important to note, that any burdens placed on the department will become requirements of the permit application and increase the cost of wetland related work in Michigan.

Exemptions

The **Agricultural Drain maintenance exemption** is problematic. The language added July 1, 2014 as the cutoff date for restrictions to go into effect. This adds an additional field season for Michigan to be out of compliance with the EPA program.

The proposed exemptions for **utility activities** have no federal equivalent and should be reworked into general permit and minor project categories. The review of the state program indicated concern with respect to exemptions for utility lines. The concern is that the state program is broader because the state exempts the activities whereas the federal government requires a Nationwide Permit for the construction, maintenance, and repair of utility lines. To maintain the equivalent, the state needs to require a permit for such activities. The permit exemption is not equivalent to the federal permitting system because a discharger must give advance notice to the Corps if the work entails a certain aerial extent and because the permit establishes specific limitations on the manner of the work's performance. Therefore, the exemptions would be broader than the federal 404 program and is not allowed by the EPA for the state to maintain assumption of the program. If provisions are not removed, the Michigan Department of Environmental Quality needs to require that dischargers give advance notice to MDEQ that is similar to the notice required by Nationwide Permit 12 as well as establish BMPs in rules for the activities per the EPA Audit.

Additionally, new exemptions were created for **"fencing" and "controlled access of livestock to streams for watering."** This has been a problem in the past in Northern Lower Peninsula which has the potentially to significantly impact water quality in an area of the State that relies on tourism. Allowing an exemption for cattle and other livestock to access the stream can create enormous problems. The animals are capable of destroying wildlife habitat, polluting the water, and trampling streambanks causing erosion. We object to the creation of a new exemption that also creates a new problem for certain areas of the state. To ensure potential adverse impacts are minimized, access of livestock and fencing need to be permitted activities.

The exemption allowing for placement of **biological residuals and cutting of woody vegetation** is in direct conflict with the federal program. In addition, unrestricted clear cutting of wetland vegetation will lead to the complete destruction of wetlands. Conifers, hardwoods, and shrubs grow well in wetlands and this provision allows that vegetation, and the functions and values it provides, to be completely removed without any limitation or any purpose. In addition, placement of woody vegetation can result in the spread of invasive species if the biological residuals are themselves are invasive or by creating an area void of native vegetation which is open then to be colonized by invasive species.

Feasible and Prudent Alternative Analysis

In general, we do not object to the language regarding a rebuttable presumption that alternatives not presently owned by the application are not feasible and prudent. However, provisions (6) and (7) on page 32 need to be removed.

The feasible and prudent analysis examines wetland impacts and looks for alternatives that have less adverse impact upon wetlands and the waters of the state. The existing alternative analysis looks at the project size and configuration. It does not separate between structure or footprint nor does it indicate a preference for necessarily smaller or larger size. Very simply, if a project with a larger square footage and smaller footprint would have less impact then it would be considered feasible and prudent under current rules.

The choice and extent of the activity needs to be considered when looking at feasible and prudent alternatives. The project purpose defines the scope of the alternatives analysis. It has relevance to seeing if it is wetland dependent, if it in the public's interest, etc. In fact, if you look at the Corps discussion on the guidance, which is where this language came from, the heart of providing flexibility and the presumption is the project purpose.

Mitigation

The provision on mitigation requirements for agricultural activities creates a bifurcated program by providing different regulatory standards for agriculture than the rest of permit activities. Additionally, Section 404 REQUIRES mitigation for activities that impact more than 1/10 acre; therefore, the state must meet that standard. DEQ may have flexibility in mitigation ratios and type of mitigation required; however, it cannot provide a mechanism that does not provide mitigation. The proposed language allows the applicant to "make a payment into a stewardship fund" created to mitigate impacted sites. However, it is unclear how this directly mitigates the impact made at specific sites. It also allows a conservation easement to be created for the impacted site, but, again, this does not mitigate the original loss of wetland or for loss of functions and values. Not providing for adequate mitigation to ensure no net loss and replace loss functions and values would jeopardize Michigan's assumption of the program.

General and Minor Permit Categories

The creation of the general and minor permit categories needs public notice and comment opportunity, as well as the ability for DEQ to limit categories based on impacts, other statutes, etc. This is to be consistent with the federal 404 program requirements.

For proposed **blueberry** activities, a general permit or minor permit category cannot be created for activities that will result in "more than minimal drainage or earth moving." Per the Clean Water Act, Minor and General Permits are designed for "minor activities" that "will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment." Therefore, we cannot authorize a general or minor permit for than "more than minimal" blueberry activities – as is blatantly stated in the bill. Again, this is broader than federal regulations. To meet Clean Water Act consistency, general and minor project categories can only be proposed for blueberry faming that includes MINIMAL drainage and earth moving.

The general permit for the drain commissioners is general permit in name only. It essentially equates to an exemption. Blanket authorization is given with no advance notice, no conditions/limitations, and report given on what they did at the end of the year. Michigan currently does not offer "permit by rule" for many reasons; primarily because we need to retain at least some review of projects prior to them occurring, to ensure there will not be substantial or irreparable damage.

Contiguous

In the past, the department has used a simple straight forward method for determining whether a wetland is contiguous to the Great Lakes (1000 feet) or an inland lake (500 feet). This provides certainty to the regulated community and was easy to administer by the department. New provisions will make this less clear, with the applicant being able to request the department do a determination of hydrologic connection between the wetland and the surface water body. This is an expensive undertaking and will not be able to be performed by the department at the costs currently included in the rules for making such a determination. The burden of making such a determination should rest with the applicant, or the department should be able to recover actual costs of performing such work.

Additionally, the proposed language removes Agricultural Drains from the determination on what is contiguous and not contiguous (Sec. 30321(6)). This provision jeopardizes 404 assumption by decreasing Michigan's jurisdiction on wetlands. Michigan is required to regulate at least all wetlands the federal government regulates. Due to Michigan's broad definition of the term contiguous, there is a small sub-set of Michigan's wetlands that are not regulated by MDEQ (those OVER 500 feet away from inland lake or stream/1000 feet from a Great Lake, and 5 acres or less). By removing Agricultural Drains from the assessment, we are narrowing our definition of contiguous and what wetlands we may regulate. There will be unregulated wetlands that are waters of the U.S. under federal law which means Michigan is no longer administering a program the equivalent of the federal government.

Funding

Finally, we are concerned about the long-term stability of the program, so we are naturally worried about funding. This bill requires more work by DEQ and yet, we are not increasing funding to the Department to accomplish this additional work. Any improvements made on programmatic efficiencies, or on correcting the EPA audit deficiencies will not be effective, if the program is continuously underfunded or in question. We urge you to support a a stable source of funding for this important program.

For almost three decades, Michigan's wetland regulatory program has served as a national model of streamlining for state, federal, and local regulations. Michigan has a proud tradition of being one of only two states to administer the Section 404 program and that tradition must be maintained. The state administration the wetland protection program in Michigan offers several benefits in terms of program efficiency and resource protection that the federal government cannot offer at this time. In order to ensure Michigan's program is not jeopardized, we urge you to oppose the current version of SB 163 and seek a substitute that would adequately correct all of the deficiencies as the state as required by the EPA while maintaining a program that does not weaken protections and put Michigan again out of compliance.

We appreciate the opportunity to offer comments to ensure activities within the state are taken with careful consideration to protect the health of our surface waters and Great Lakes, and the citizens and visitors who rely upon those water resources. We urge you to give careful consideration to the comments provided and incorporate them into a bill that will ensure the state maintains administration of the 404 program and protects environmental quality.

Thank you for the opportunity to provide you with these comments. Since the legislative process has been moving very quickly, in addition to these comments we also sent a second attachment in our email, which is suggested bill language to reflect our desired changes. We hope this is helpful. Please feel free contact Jennifer McKay or Grenetta Thomassey with questions or concerns regarding the comments provided at 231-348-1181

Sincerely,

Jennifer McKay
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Grenetta Thomassey, PhD
Program Director
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Tip of the Mitt Watershed Council
Substitute SB 163 (S-2)
June 3, 2013

Pages 2 – 3: *Part 13 language additions should be removed.*

Page 7, Line 10: *Change date of July 1, 2014 to* ***JANUARY 1, 2013***

Page 8, Line 10: *Change date of July 1, 2014 to* ***JANUARY 1, 2013***

Page 8, Line 26: *Remove "culvert extensions of not more than 24 additional feet per culvert."*

Page 9, Line 2: *Change "reasonable" to* ***20 DAYS.***

Page 9, Lines 19-22: *Remove (M) ACCESS OF LIVESTOCK TO STREAMS FOR WATERING OR CROSSING*

Page 16, Lines 14-27 and Page 17, Lines 1-17: *Strike (11)(B), (C), and (D) and modify (11) and 11(A) as follows:*

> 6) THE DEPARTMENT SHALL DEVELOP BY DECEMEBER 31, 2013 AND MAINTAIN A GENERAL PERMIT **OR MINOR PROJECT CATEGORY** FOR ACTIVITIES IN DRAINS LEGALLY ESTABLISHED PURSUANT TO THE DRAIN CODE OF 1956, 1956 PA 40, MCL 280.1 TO 280.630.
>
> (A) THE GENERAL PERMIT **AND/OR MINOR PROJECT CATEGORY** SHALL COVER INSTALLATION AND REPLACEMENT OF CULVERS AND CLEAR SPAN BRIDGES, CUVLERT EXTENSIONS AND END SECTIONS, DRAIN REALIGNMENTS, INSTALLATION OF BANK STABILIZATION STRUCTURES, SPOIL PLACEMENT, AND OTHER COMMON DRAIN ACTIVITIES THAT USE BEST MANAGEMENT PRACTICES.

Page 20, Line 10: *Change date of July 1, 2014 to* ***JANUARY 1, 2013***

Page 20, Line 24: *Change date of July 1, 2014 to* ***JANUARY 1, 2013***

Page 22, Line 3 – Page 23, Line 15: *Remove exemption for utility lines. (L and M)*

> If provisions are not removed, the DEQ needs to require that dischargers give advance notice to MDEQ that is similar to the notice required by Nationwide Permit 12 as well as establish BMPs in rules for the activities per the EPA Audit.

Page 23, Line 20-25: *Remove Sec. 30305(2)(O) "(O) PLACEMENT OF BIOLOGICAL RESIDUALS FROM ACTIVITIES INCLUDING THE CUTTING OF WOODY VEGETATION OR THE IN-PLACE GRINDING OF TREE STUMPS..."*

Page 24, Line 14-15: Remove Sec. 30305(4)(a)(ii) *"(ii) IS BEING USED FOR ANOTHER PURPOSE UNRELATED TO EXCAVATION AS PART OF COMMERCIAL SAND, GRAVEL, OR MINERAL MINING".*

Page 25, Line 11-12: Remove Sec. 30305(5)(B) *"(B) IS BEING USED FOR ANOTHER PURPOSE UNRELATED TO EXCAVATION AS PART OF COMMERCIAL SAND, GRAVEL, OR MINERAL MINING".*

Page 25, Line 22-25: *Remove Sec. 30305(6)(C) "(C) PLACEMENT OF BIOLOGICAL RESIDUALS FROM ACTIVITIES INCLUDING THE CUTTING OF WOODY VEGETATION OR THE IN-PLACE GRINDING OF TREE STUMPS..."*

Page 29, Line 12: *Remove reference to cranberry activities.*

Page 29, Line 14: *Add "**THIS SUBDIVISION DOES NOT APPLY ON OR AFTER OCTOBER 1, 2015."***

Page 32, Lines 5-9: *Modify as follows*:

(C) THE ACTIVITY IS UNDERTAKEN FOR THE CONSTRUCTION OR EXPANSION OF A SINGLE FAMILY HOME AND ATTENDANT FEATURES, ***SUCH AS A DRIVEWAY, GARAGE, STORAGE SHED, OR SEPTIC FIELD,*** THE CONSTRUCTION OR EXPANSION OF A BARN OR OTHER FARM BUILDING; OR THE EXPANSION OF A SMALL BUSINESS FACILITY.

(D) THE ACTIVITY IS NOT COVERED BY A GENERAL PERMIT ***OR MINOR PROJECT CATEGORY***.

Page 32, Lines 10-16: *Strike Section (6) and (7)*

Page 36, Lines 5-11: *Remove Section (6) providing special mitigation provisions for agricultural activities.*

Page 39, Lines 16-23: *Modify language to include opportunity for public notice and comment. Add" **AFTER PROVIDING NOTICE AND AN OPPORTUNITY FOR A PUBLIC HEARING"***

"The department shall coordinate general permit and minor project categories under this part and parts 301 and 325 and **AFTER PROVIDING NOTICE AND AN OPPORTUNITY FOR A PUBLIC HEARING** MAY DEVELOP AND MAINTAIN NEW GENERAL PERMIT AND MINOR PROJECT CATEGORIES consistent with nationwide permits, as appropriate."

Page 39, Line 16-23: *Add language to ensure that the General Permit and Minor Permit categories meet the requirement of Section 404. Suggested language: "**THE DEPARTMENT MAY ALTER THE SCOPE OF THE ACTIVITIES COVERED***

UNDER THE GENERAL PERMIT AND MINOR PROJECT CATEGOEIS CORRESPONDING TO NATIONWIDE PERMITS, SUBJECT TO LIMITATIONS BASED ON BEST MANAGEMENT PRACTICES AND NECESSARY TO ENSURE THAT ADVERSE ENVIRONMENTAL EFFECTS ARE MINIMAL OR BASED ON OTHER STATUTES, WHICH LIMITATIONS MAY BE ESTABLISHED."

Page 39, Line 25: *Add "**AND MINOR PROJECT CATEGORIES**"*

> "THE DEPARTMENT SHALL DEVELOP BY DECEMBER 31, 2013 AND MAINTAIN GENERAL PERMIT **AND MINOR PROJECT CATEGORIES** FOR BLUEBERRY PRODUCTION ACTIVITIES INCLUDING MINIMAL DRAINAGE AND EARTH MOVING IF THE FOLLOWING REQUIREMENTS ARE MET:..."

Page 40, Lines 12-15: *Strike Section (7)*

Page 43, Line 26: *After "EVALUATION.", add the following:*

> **"IF A PERSON CLAIMS THAT A WETLAND IS NOT CONTIGUOUS BUT IT IS PARTIALLY OR ENTIRELY LOCATED WITHIN 500 FEET OF THE ORDINARY HIGH WATERMARK OF AN INLAND LAKE OR POND OR A RIVER OR STREAM OR IS WITHIN 1,000 FEET OF THE ORDINARY HIGH WATERMARK OF ONE OF THE GREAT LAKES OR LAKE ST. CLAIR, THEY SHALL PROVIDE WITH THE REQUEST FOR A DETERMINATION SUFFICIENT INFORMATION TO REBUT THE PRESUMPTION THAT THE WETLAND LOCATED WITHIN THAT DISTANCE IS CONTIGUOUS TO THE INLAND WATER BODY OR THE GREAT LAKES. IF THE PERSON REQUESTS THAT THE DEPARTMENT MAKE SUCH DETERMINATION PURSUANT TO R 281.924(5), THE PERSON SHALL BE RESPONSIBLE FOR THE ACTUAL COSTS OF THE DEPARTMENT TO MAKE SUCH DETERMINATION.".**

Page 43, Line 27 – Page 44, Line 3: *Strike Section (6) removing agricultural drains from contiguous assessments*

Page 45, Line 1: Add "**THIS SUBSECTION SHALL NOT APPLY AFTER OCTOBER 1, 2015.**"

Joy Brewer

From: Stephen Daunt
Sent: Monday, June 03, 2013 1:41 PM
To: Joy Brewer; Eric Ventimiglia
Subject: RE: Script for Tuesday's committee

Be prepared to adopt a sub and move SB 264, but it may not happen.

From: Joy Brewer
Sent: Monday, June 03, 2013 12:07 PM
To: Eric Ventimiglia; Stephen Daunt
Subject: Script for Tuesday's committee

What is the plan for tomorrow's committee meeting?

So far, I have us adopting the minutes from the May 21st meeting.

Thanks!

Joy